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IN

* * * *

SARA L. CONLIE, aka
SARA L. SEALS,

Petitioner/Appellant,

vs.

DAVID C. CONLIE

Respondent

:
: APPELLEE'S RESPONSE TO OPENING
: BRIEF

:
: Case No. 20050450
: District Ct. No. 994300200

* * * *

RESPONDENT'S RESPONSE TO THE PETITIONER'S APPEAL

FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT

THE HONORABLE RANDALL SKANCHY PRESIDING

* * * *

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FILED
UTAH APPELLATE COURTS
NOV 14 2005

IN THE UTAH COURT OF APPEALS

* * * *

SARAH S. CONDIE, nka	:	
SARAH S. SEALS,	:	APPELLEE'S RESPONSE TO OPENING
	:	BRIEF
Petitioner/Appellant,	:	
	:	
vs.	:	
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Section 78-2a-3(2) of the Utah Code Annotated.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

1. Whether the trial court abused its discretion by denying Ms. Seals (hereinafter “Ms. Seals”) request for attorney’s fees as the Bankruptcy Court itself has the statutory authority to award attorney’s fees. In making an award of attorney’s fees. In the divorce proceedings, the trial court’s decision regarding a request for attorney’s fees, is reviewed for an abuse of discretion. *Rasband vs. Rasband* 752 P.2d 1331 (Utah App. 1998). The trial courts have the authority to award fees in these cases, however the trial court must factor in the following considerations in making the award of fees, “[e]vidence of the receiving spouses financial need, the payor’s spouses ability to pay, and the reasonableness of the requested fees.” *Shinkoskey vs. Shinkoskey*, 19 P.3d 1005 1010 (Utah Court App. 2001) (citing) *Kelly vs. Kelly* 2000 (Utah App. 236). Furthermore, Utah Courts upheld that, “[t]he trial court . . . must make the findings of fact explicit in support of its legal conclusions . . . without adequate findings of fact, there can be no appellate review.” (*id. citing Willey vs. Willey* 951 P.2d 226, 230 (Utah 1987)).

2. Whether the trial court erred in finding that the bankruptcy proceeding was the proper time and place for Ms. Seals to request for attorney’s fees incurred as a result of the adversarial proceeding she initiated. A trial courts conclusions of law are

reviewed for correctness. *See S.S. vs. State*, 972 P.2d 439, 440 - 441 (Utah 1998); *Orten vs. Carter*, 970 P.2d 1254, 1256 (Utah 1988); *AK & R Whipple Plumbing & Heating vs. Aspen Constr.* 977 P.2d 582, 522 (Utah Ct App. 1999).

3. Whether the trial court erred in its conclusion that finding the parties' Hopkinsville Federal savings Bank (hereinafter "HFSB") obligation was satisfied in April 2001. The trial court's conclusion of law reviewed for correctness. *See S.S. vs. State*, 972 P.2d 439, 440 - 441 (Utah 1998); *Orten vs. Carter*, 970 P.2d 1254, 1256 (Utah 1988); *AK & R Whipple Plumbing & Heating vs. Aspen Constr.* 977 P.2d 582, 522 (Utah Ct App. 1999).

4. Whether the trial court erred in its conclusion that the adversarial proceeding that Ms. Seals filed in Mr. Condie's (hereinafter "Mr. Condie") Bankruptcy proceeding to determine the discharge ability of Mr. Condie's obligation under the Decree of Divorce was wholly unnecessary. The trial court's conclusion of law reviewed for correctness. *See S.S. vs. State*, 972 P.2d 439, 440 - 441 (Utah 1998); *Orten vs. Carter*, 970 P.2d 1254, 1256 (Utah 1988); *AK & R Whipple Plumbing & Heating vs. Aspen Constr.* 977 P.2d 582, 522 (Utah Ct App. 1999).

DETERMINATIVE STATUTES

11 U.S.C. §105 (a)

18 U.S.C. §105

Rule 7054 Federal Rules of Bankruptcy Procedure

U.C.A. §30-3-32 (2)

STATEMENT OF THE CASE

I. Nature of the Case

This is a response to an appeal filed by Ms. Seals, Sarah S. Seals, from the final order of the Third Judicial District Court Tooele County, which denied Ms. Seals request for the award of attorney's fees incurred in connection with the Mr. Condie, David Condie, bankruptcy proceedings. The fees were incurred by Ms. Seals for the services of attorney, Steven Rupp to bring an adversarial proceeding against Mr. Condie to prevent him from potentially discharging his obligations as outlined in the Decree of Divorce. The bankruptcy court at the time of those proceedings in its' own words, deemed the adversarial proceeding to be to be, "wholly unnecessary." (R. 424)

II. Statement of Facts

1. A Decree of Divorce was entered in the above-entitled matter on the 22nd day of November, 1999. (R. 145). Paragraph 14 of that Decree orders Mr. Condie to "[a]ssume complete responsibility for all loans, debts and obligations, whether incurred by [Mr. Condie] or incurred jointly as husband and wife, with the exception of the loan on the 1995 Eagle Vision automobile, which [Ms. Seals] shall assume." (R. 139). That same Decree states that Mr. Condie "[s]hall pay [Ms. Seals] alimony in the amount of \$200.00 per month. This amount shall be paid in two monthly installments due on or before the 5th and 20th of each month, commencing October 5th, 1999 and shall continue

for 12 consecutive months and thereafter \$300.00 per month for an additional 72 consecutive months or until the remarriage or cohabitation of [Ms. Seals].” (R. 141). Further, the Decree states in paragraph 16 “Each party shall assume and pay their respective attorneys fees and costs incurred in this matter. (R. 139). Nowhere in the Decree of Divorce, or in any other contract does Mr. Condie become responsible for the payment of any fees that may be incurred by Ms. Seals for costs and fees she may occur associated with enforcement of the Decree of Divorce.

2. The obligation that Mr. Condie was to pay to HFSB went into default in August of 2000. HFSB filed an action against both parties in Kentucky state court to recover under the promissory note associated with the loan. A parcel of property in Tooele County, State of Utah, secured that promissory note which Ms. Seals had previously owned. However, at the time of the default Ms. Seals had quit claimed the property to her mother. (R. 550, 51:11-52:8)

3. Mr. Condie filed for Chapter 7 bankruptcy relief on December 29, 2000. Mr. Condie initially did not list Ms. Seals in that petition, as it was never his intention to discharge any of his obligations to Ms. Seals under the Decree of Divorce. (R. 550, pg. 91:8-25, and pg. 92: 1-25). However, after Ms. Seal’s insistence that if Mr. Condie did not list her in the Bankruptcy proceeding she would attempt to get his Chapter 7 petition dismissed, Mr. Condie ultimately amended his filing to include her. As indicated by the billing statement from Mr. Rupp (Ms. Seals Bankruptcy attorney in the adversarial

proceeding) Ms. Seals spent 2 hours in a meeting with Mr. Rupp preparing for a 341 meeting of creditors on the 24th day of January 2000, for a Bankruptcy proceeding in which Ms. Seals was not listed as a creditor. (R. 550, pg. 93: 11-25).

4. After Ms. Seals retained Mr. Rupp, several offer's of settlement were exchanged, however, ultimately, the matter was set for hearing on Ms. Seals Motion for Summary Judgment, on January 14th, 2002. The reason the matter could not settle was due to the fact that Ms. Seals wanted any stipulation as to nondischargability of the HFSB debt to include provisions that would require Mr. Condie to hold not only Ms. Seals harmless on the debt to HFSB, but to include family members and others with "[e]conomic interests..." in the property associated with the HFSB note. (*see* transcript of Motion for Summary judgment proceedings R. 443: 1-25, and R. 444: 1-25).

5. Further, the Court in the Bankruptcy adversarial proceeding allowed Ms. Seals a continued deadline in which to file a proposed pretrial order to have the court follow up on any additional issues that were outstanding as far as Ms. Seals was concerned. The reason for this extension was because Ms. Seals was requesting her attorneys fees in connection with the adversarial proceeding and the court was allowing them time to pursue that issue at a later date and bring the matter before the court. (R. 437-438). Ms. Seals never followed through with this and thus, never actually asked the Bankruptcy court to determine whether or not she was entitled to any fees for the adversarial proceeding.

6. In April of 2001, Mr. Condie obtained a loan from his friend and then employer Brian Steffensen to satisfy the obligation to HFSB. The HFSB note was assigned to Brian Steffensen's LLC with not terms for repayment specified. (R. 550, pg. 86: 5-25, pg. 87: 1-3). Hopkinsville Federal then dismissed the lawsuit. (R. 550, pg. 86: 17-25).

7. In April of 2004, Mr. Condie paid the remaining balance of the HFSB note and Mortgage. A release of lien was executed on April 26, 2004. (R. 647).¹ On August 11, 2004, Ms. Seals filed the Motion for Judgment of Support Arrears Etc. and for Finding in Contempt that led to the evidentiary hearing held on December 8 and 9 from which this appeal arises.

The court in that decision stated as follows:

The Bankruptcy court in its ruling on Seals Motion for Partial Summary Judgement did not award attorney's fees, nor did the parties in their subsequent Stipulation and Settlement agreement provide for the recoupment of attorney's fees for Steven Rupp in pursuing an adversarial proceeding against Mr. Condie. Those proceedings were the appropriate time and place for the parties to ask for attorney's fees and this Court will not grant such fees on that basis. Furthermore, the evidence suggests that the adversarial proceeding was wholly unnecessary

¹ It is noteworthy that had Mr. Condie simply been making payments under the original HFSB note, that note would not have been paid in full until October of 2004. As it turned out, the note was satisfied some 6 months earlier than was originally anticipated.

initially, as Seals was not named a creditor in the bankruptcy proceedings.

Thereafter, the evidence is contested as to whether Seals requested to be named a creditor under the bankruptcy proceedings or not, and thus Seals has not met her burden of proof on that issue. Finally, this court notes that the Hopkinsville obligation was satisfied in April 2001, thus making any subsequent proceedings in bankruptcy wholly unnecessary as is underscored by the Court's own musings after listening to the parties' argument in Seals' Motion for Partial Summary Judgment that "...under the circumstances I can't see that there is any dispute.") Transcript of Partial Summary Judgment proceedings, pp. 19-20.) Accordingly, this Court denies Judgment for any fees incurred by Seals in the bankruptcy proceedings.

(R. 425-424).

8. Ms. Seals filed a pleading entitled Post- Order Motion to Embolden the Court to Alter or Amend its Order, Filed February 1, 2005, and Certain Findings and Conclusions, on February 11, 2005. (R. 419). That Motion was denied on April 27, 2005 via written memorandum decision. (R. 510-509).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying Ms. Seals request for attorneys fees

in connection with the adversarial proceeding in the bankruptcy court action initiated by Mr. Condie. Law and the facts supported that decision. Further, even if the trial court erred in determining that the bankruptcy proceeding was the correct time and place for Ms. Seals to have addressed the issue of Ms. Seals attorneys fees associated with the adversarial action, the error is harmless as the Court in the Divorce action made ample findings to support the denial of fees other than the fact that the court thought the bankruptcy action was the proper forum to assess the fee issue. 11 U.S.C. § 105(a) (2005) gives the bankruptcy court extremely broad powers as follows: “The court **may** issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” (emphasis added). This provision of the bankruptcy code is commonly used to make an award of attorney fees in bankruptcy cases. Furthermore, the court may award attorney fees in accordance with Rule 7054 of the Federal Rules of Bankruptcy Procedure. Rule 7054 states that “the court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides.

Ms. Seals’ claim that she was forced, by actual knowledge of Mr. Condie’s Chapter 7 filing, to file an adversary proceeding is unfounded. That Appellant’s “adversarial proceeding was wholly unnecessary” (R. 424) is clear not only from the Order dismissing HFSB’s claim against Mr. Condie and Appellant (R. 729), but from the Bankruptcy Court’s decision stating that “. . . under the circumstances I can’t see that there is any dispute.” (R. 424)

The trial court did not err in concluding that the HFSB debt was satisfied in April of 2001. The record clearly reflects that, as to Hopkinsville Federal Savings and Bank, the note was extinguished and the lawsuit that was filed by Hopkinsville Federal was dismissed in April of 2001. The fact that Mr. Condie did so by having his friend and then employer Brian Steffensen loan him the money and assume the note with no repayment terms stated is not what the court was trying to point out in making that finding. The court was simply pointing out that a note, which had gone into default, had been taken out of default by Mr. Condie's actions in April of 2001, and that as to the original creditor, it had been satisfied.

Furthermore, the appeal of Ms. Seals is clearly wholly frivolous. Ms. Seals has spent in excess of \$20,000 in an attempt to collect attorneys fees against Mr. Condie for a debt which was only \$12,000 or so to begin with, which she was never in any danger of being held responsible for paying, and which has been practically satisfied for over four years.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion By Denying Ms. Seals' Request For Attorney Fees Because the Bankruptcy Court Does Have the Statutory Authority to Award Attorneys' Fees.

The Trial Court did not abuse its discretion by making a finding that the bankruptcy proceeding was the appropriate time and place for Ms. Seals to request attorney fees. Federal bankruptcy law 11 U.S.C. § 105(a) (2005) gives the bankruptcy

court extremely broad powers as follows: “The court **may** issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

(emphasis added). This provision of the bankruptcy code is commonly used to make an award of attorney fees in bankruptcy cases. Furthermore, the court may award attorney fees in accordance with Rule 7054 of the Federal Rules of Bankruptcy Procedure. Rule 7054 states that “the court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides.

Ms. Seals argues that attorney fees are not recoverable in a bankruptcy proceeding “unless authorized by statute or contract.” (Ms. Seals’ Opening Brief, p.11). As authority for her argument that the trial court erred in not awarding fees, Ms. Seals points to the case of *Dennison v. Hammond*, 236 B.R. 751, 769 (Bankr. D.Ut. 1998). In *Dennison*, the ex-wife seeking to enforce a debt in the bankruptcy court, was entitled, by way of the parties’ decree of divorce, to a portion of a contract receivable that was paid monthly to her ex-husband. The ex-husband sought to discharge that debt in a Chapter 7 proceeding. The court ultimately refused to discharge the debt and the ex-wife requested attorney fees from the bankruptcy court.

The distinction between *Dennison* and the present case is that the ex-wife in *Dennison* was an actual creditor while Ms. Seals, in the present case, did not even have a cognizable claim. This much was acknowledged by the trial court and the bankruptcy court. (R. 424) The trial court, in its order wrote that:

the evidence suggests that the adversarial proceeding was wholly unnecessary initially, as Seals was not a named creditor in the bankruptcy proceedings. Thereafter, the evidence is contested as to whether Seals requested to be named a creditor under the bankruptcy proceedings or not, and thus Seals has not met her burden of proof on that issue.

(R. 424)

The Bankruptcy Court acknowledged that the Hopkinsville obligation had been satisfied in April of 2001, when it wrote that “. . . under the circumstances I can’t see that there is any dispute.” (R. 424)

There is an important distinction in the cases cited by Ms. Seals in her brief and the case at bar, in the present case, the only language regarding attorney fees in the parties’ Decree of Divorce was the statement “It is reasonable each party shall assume their own attorney fees.” (R. 129, ¶ 25.) Fees for the future enforcement of the Decree were not contemplated and, therefore, there was no basis for an award of fees in a state court proceeding. In the cases cited by Ms. Seals, the Bankruptcy Courts were able to turn the requests for attorney fees away knowing that the creditor parties would have a contractual basis for getting attorney fees in a state court.

In *Dennison*, the creditor ex-wife, clearly had a claim in state court for the ex-husband’s breach of the parties’ decree of divorce. In such a situation, the court appropriately cited to the American rule in its finding that a claim for attorney fees in the enforcement of a divorce decree is not appropriately dealt with in a federal bankruptcy court. In contrast, where there is a factual dispute as to whether Ms. Seals requested to be

a named creditor, and as to whether she had an ownership interest in that property at the time Mr. Condie filed for bankruptcy, the American rule does not apply and it is within the broad powers of the bankruptcy court under 18 U.S.C. § 105 and the Federal Rules of Bankruptcy Procedure, Rule 7054, to make an award for attorney fees. Consequently, this Court should affirm the Trial Court's findings that the Ms. Seals should have sought attorney fees in the Bankruptcy proceeding before requesting fees from the Trial Court.

II. Even If the Trial Court Erred in Finding that the Bankruptcy Proceeding Was the Proper Time and Place for Ms. Seals to Request Attorney Fees, the Trial Court Made Sufficient Findings for Denying Ms. Seals Request for Attorney Fees.

Even if the Ms. Seals could not be awarded attorney fees by the Bankruptcy Court, the Trial Court made sufficient findings to properly deny Ms. Seals the requested attorney fees. Utah Code Annotated § 30-3-3(2) states as follows:

In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

Trial courts have the authority to award attorney fees, however, “the trial court must base the award on evidence of the receiving spouse’s financial need, the payor spouse’s ability to pay, and the reasonableness of the requested fees.” *Shinkoskey v. Shinkoskey*, 19 P.3d 1005, 1010 (Utah Ct. App. 2001) (citing *Kelley v. Kelley*, 2000 UT App. 236). Furthermore, Utah courts have held that “the trial court . . . must make the

findings of fact explicit in support of its legal conclusions. . . . Without adequate findings of fact, there can be no meaningful appellate review.” *Id.* (quoting *Willey v. Willey*, 951 P.2d 226, 230 (Utah 1997)).

It is indisputable in the present case, that the Trial Court made specific findings as to why it awarded no attorney fees to Ms. Seals. Those findings are as follows: first, that the Bankruptcy Court did not award fees in its findings and the Ms. Seals did not seek attorney fees from the Bankruptcy Court, despite being invited to do so by the court. (R. 437-438). Secondly, the parties’ subsequent stipulation and agreement did not provide for the payment of attorney fees in connection with the bankruptcy proceeding. Third, the Trial Court stated that “the evidence suggests that the adversarial proceeding was wholly unnecessary initially, as Seals was not a named creditor in the bankruptcy proceeding.” (R. 424) Additionally, the Trial Court made findings with regard to the Mr. Condie’s ability to pay attorney fees when it addressed the issue of contempt:

The court finds that there is no basis for a finding of contempt, as the evidence concerning Condie’s financial condition during the periods in questions and the payments on child support he did make suggest that Condie was not intentionally or deliberately avoiding or neglecting his obligation to his children.

(R. 425)

Finally, the Trial Court noted that “the Hopkinsville obligation was satisfied in April 2001, thus making any subsequent proceedings in bankruptcy wholly unnecessary as is underscored by the Bankruptcy Court’s own musings after listening to the parties’

argument in Seals' Motion for Partial Summary Judgment that "... under the circumstances I can't see that there is any dispute." (R. 424)

As further evidence that the Trial Court made sufficient findings for the denial of fees, Mr. Condie points to the award of fees to Ms. Seals in the Order on Petitioner's Motion for Judgment and for a Finding of Contempt. Ms. Seals sought "Kentucky fees," "Bankruptcy fees," "Chipman Release of Lien Fees," and "Chipman Fees for Hearing." The Trial Court carefully considered each of these requests and made findings in favor of Ms. Seals for attorney fees for each of her requests except the bankruptcy fees. (R. 422-425) These attorney fees were awarded generously by the Trial Court considering that the Court ultimately found the Mr. Condie to not be in contempt of court. (R. 425)

The Trial Court's Order awarding Ms. Seals attorney fees in connection with the same property that was the subject of Ms. Seals' complaint in Mr. Condie's bankruptcy proceeding. The award of attorney fees demonstrates the Trial Court's further consideration of the Ms. Seals' prayer for fees in her Motion for Judgment of Support and for a Finding of Contempt and supports Mr. Condie's position that the Trial Court did not commit reversible error in refusing to award Ms. Seals additional fees.

In *Willey v. Willey*, 951 P.2d 226, 234 (Utah 1997), the Supreme Court articulated the well settled rule that "the trial court is in the best position to evaluate evidence and make findings of fact." Furthermore, the Supreme Court stated that "due to the advantaged position and the responsibilities of the trial court in such matters, we will

accord some verity to [its] actions; and we will not disturb [its] findings nor the determination made thereon unless it appears that the evidence preponderates against them so that an inequity or injustice has resulted. Id.

Ms. Seals has failed to articulate any meaningful manner in which the Trial Court ignored the evidence before it and that an injustice occurred. The Trial Court carefully spelled out its reasoning for not awarding attorney fees to Ms. Seals, including Mr. Condie's inability to pay. Even assuming, *arguendo*, that the Bankruptcy Court did not have the authority to award attorney fees, the Trial Court left a litany of other reasons why Ms. Seals should not be awarded attorney fees. Accordingly, the Trial Court's decision denying attorney fees to Ms. Seals should be affirmed on the basis that the Trial Court's decision was replete with sufficient findings for the denial of fees.

III. Ms. Seals has Failed to Marshal the Evidence Pursuant to Rule 24 of the Utah Rules of Appellate Procedure in Support of Her Contention that the Trial Court Erred in Not Awarding Ms. Seals Attorney Fees.

The Ms. Seals has a duty on appeal to do more than merely reargue the same evidence that was brought before the trial court. *See, generally, Schaumberg v. Schaumberg*, 875 P.2d 598, 603 (Utah Ct. App. 1994); *Shepherd v. Shepherd*, 876 P.2d 429, 432 (Utah Ct. App. 1994) stating, "If the Ms. Seals fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court. . ." *See, also, Wright v. Westside Nursery*, 787 P.2d 508, 512 n.2 (Utah Ct. App. 1990):

Wright beseeches us to make a thorough review of the whole record, which fills a box the

size of an orange crate. We do not apologize for declining Wright's invitation. The very purpose of such devices as the 'marshaling' doctrine and R. Utah Ct. App. 24(a)(7), requiring that all references in briefs to factual matters 'be supported by citations to the record,' is to spare appellate courts such an onerous burden. Absent exceptional circumstances, our review of the record is limited to those specific portions of the record which have been drawn to our attention by the parties and which are relevant to the legal questions properly before us.

In *Schaumburg*, the Court of Appeals criticized the Ms. Seals for failing to marshal the evidence supporting his challenge to the trial court finding and demonstrate "how the marshaled evidence is insufficient to support the finding." *Id.* Furthermore, the court stated that the "husband [Ms. Seals] has not marshaled the evidence, but has merely reargued the evidence supporting his position." *Id.*

Similarly, in the present case, Ms. Seals has failed to marshal the evidence in her appeal instead, rehashing to this Court, her argument to the Trial Court. The Ms. Seals marshaled no evidence in support of her position that the Trial Court failed to make specific findings of facts. It is therefore, appropriate, for this Court to affirm the Trial Court's findings that Ms. Seals is not entitled to attorney fees from the Mr. Condie.

IV. Ms. Seals Was Not Forced to File Her Adversary Proceeding Because She Was Not a Named Owner of the Property at the Time Mr. Condie Filed For Bankruptcy and HFSB Was Not Pursuing a Collection of the Loan Against Ms. Seals.

Ms. Seals' claim that she was forced, by actual knowledge of Mr. Condie's Chapter 7 filing, to file an adversary proceeding is unfounded. That Ms. Seals' "adversarial proceeding was wholly unnecessary" (R. 424) is clear not only from the Order dismissing HFSB's claim against Mr. Condie and Ms. Seals (R. 729), but from the

Bankruptcy Court's decision stating that "... under the circumstances I can't see that there is any dispute." (R. 424)

Ms. Seals' argument is carefully crafted around the facts as they actually occurred leading up to the adversary proceeding. HFSB filed a complaint against the Mr. Condie and Ms. Seals in August of 2000. (R. 680-684) The debt HFSB was suing on was a loan that Mr. Condie took responsibility for under the Decree of Divorce, and agreed "to hold the other [Ms. Seals] harmless in relation thereto." (R. 158, ¶ 14) In April 2001, HFSB dismissed its complaint against the parties. (R. 729) It is this event to which the Trial Court referred to in its Order, as making Ms. Seals' pursuit of an adversary proceeding "wholly unnecessary." (R. 424) Moreover, the trial court awarded attorney fees for counsel retained by Ms. Seals in defending against the HFSB lawsuit. (R. 425)

Furthermore, there is a factual dispute as to whether the Ms. Seals had Quit-Claimed the deed to a family member (which she did), in order to protect the property. (R. 550, 51:11-52:8) Although her name was still on the mortgage for the property, Mr. Condie was bound by the parties' Decree to hold Ms. Seals harmless, and any encumbrances on the property would have followed ownership. The Trial Court's finding that Ms. Seals' adversary proceeding was unnecessary should be affirmed by this Court. The Trial Court's finding was based on the facts as they actually occurred and supported by the findings of the Bankruptcy Court.

V. The Trial Court's Findings that the HFSB Note and Mortgage Was Satisfied Was Not an Unfounded Conclusion of Law and Even If the

Trial Court's Decision Was in Error, it is Harmless Error that is Not Reversible.

Ms. Seals' assertion that the Trial Court's findings regarding the satisfaction of the HFSB, is unfounded, is incorrect and even if unfounded does not amount to reversible error entitling Ms. Seals to attorney fees. The Trial Court fairly came to the conclusion that the HFSB Note and Mortgage had been satisfied in April 2001, based on its understanding of the facts before the court. (R. 424) Moreover, this was the same conclusion the Bankruptcy Court came to in its finding that "... under the circumstances I can't see that there is any dispute." (R. 424). The record reveals that the note was indeed satisfied in April of 2001 when it was assigned to a third-party, Mr. Steffensen. (R. 648) The record is replete with factual reasons why both the Trial Court and the Bankruptcy Court would come to the conclusion that the note had been satisfied in April 2001.

Notwithstanding the Trial Court and Bankruptcy Court's findings, even if the Trial Court did come to an incorrect conclusion about the Note and Mortgage, the mistake amounts only to harmless error, and is, therefore, not reversible. Rule 61 of the Utah Rules of Civil Procedure states as follows:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Id.

Rule 61 has been construed as “placing upon an Ms. Seals the burden of showing not only that an error occurred, but that it was substantial and prejudicial in that the Ms. Seals was deprived in some manner of a full and fair consideration of the disputed issues by the jury.” *See, Onyeabor v. Pro Roofing Inc.*, 787 P.2d 525, 529 (Utah Ct. App. 1990) (citing *Ashton v. Ashton*, 733 P.2d 147, 154 (Utah 1987)). Ms. Seals has failed to meet her burden for showing that a “substantial and prejudicial” error occurred.

Assuming, for the sake of argument, that the Trial Court erred in its finding that the Note and Mortgage had been satisfied, the Ms. Seals suffered no harm because a sufficient basis for not awarding attorney fees still exists. The Trial Court based its decision to not award attorney fees for the Ms. Seals’ adversarial proceeding in the Bankruptcy trial on multiple findings of which the satisfaction of the Note and Mortgage was just one reason. The Trial Court had a sufficient basis for its finding that the HFSB Note and Mortgage was satisfied in April 2001.

Nevertheless, even if this Court finds that the Trial Court’s erred in finding that the Note and Mortgage were satisfied, the mistake constitutes harmless error and should not be reversed.

VI. Mr. Condie Should Be Awarded Attorney Fees Based on Ms. Seals’ Frivolous Appeal.

Mr. Condie is entitled to an award of attorney fees based on Ms. Seals' frivolous appeal.

This Court may award attorney fees to Mr. Condie pursuant to Rule 33 of the Utah Rules of Appellate Procedure. Rule 33(b) sets forth the standard for what constitutes a frivolous appeal:

For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law.

Utah courts have further stated that "a frivolous appeal is one without reasonable legal or factual basis. The "sanction" for bringing a frivolous appeal is applied only in egregious cases. . . Egregious cases may include those obviously without merit, with no reasonable likelihood of success, and which result in the delay of a proper judgment." Maughan v. Maughan, 770 P.2d 156, 162 (Utah Ct. App. 1989). Ms. Seals' failure to marshal the evidence, along with the lack of legal basis for her appeal amounts to a frivolous claim. This frivolous appeal has been the cause of great expense and stress to the Mr. Condie and, therefore, Mr. Condie should be entitled to an award of attorney fees.

CONCLUSION

The Trial Court's findings that Ms. Seals is not entitled to attorney fees incurred in an unnecessary adversarial proceeding should be affirmed. Ms. Seals failed to marshal the evidence and did not meet her burden of showing an abuse of discretion on the part of the Trial Court by not awarding attorney fees for the adversarial proceeding. The

Bankruptcy Court does have broad statutory authority to award attorney fees.

Furthermore, even if the Trial Court erred in its understanding of the Bankruptcy Court's authority to award fees, it was harmless error because the Trial Court made sufficient findings on other grounds for not awarding attorney fees. Finally, the frivolous nature of Ms. Seals' claims entitle Mr. Condie to an award of attorney fees.

DATED this 14 day of NOVEMBER 2005.

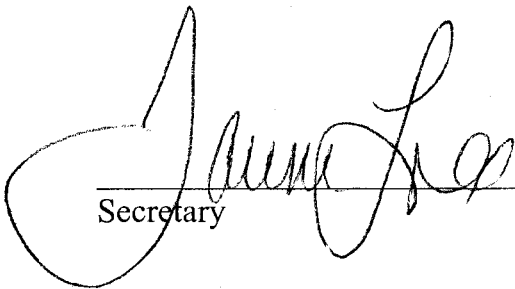
CORPORON, WILLIAMS & BRADFORD

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Attorney for Appellee

MAILING CERTIFICATE

Undersigned certifies that two copies of the foregoing were mailed this 14 day of November 2005, via first class mail, postage prepaid, to the following:

Scott B. Mitchell
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Secretary